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No. 82-1944

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN A. GONSALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In our petition, we explained that the decision of the court of appeals upholding the district court's invocation of "supervisory power" to dismiss an indictment on the ground that conducting a trial would impose an undue burden upon the district court effects an unprecedented judicial intrusion upon the prerogatives of the prosecutor (together with the grand jury) to determine the charges upon which persons believed guilty of crimes are to be prosecuted. We also argued that this application of a claimed supervisory power serves none of the recognized purposes for exercise of supervisory power and represents an abdication of the district court's statutory jurisdiction to try "all offenses against the laws of the United States." 18 U.S. 3231. Finally, we argued in our petition that even if supervisory power to dismiss indictments is available to the courts in extraordinary cases, there is no attribute of this

case, which involves the trial of a single defendant upon a two-count indictment, that justifies exercise of such authority.

Respondent has essayed no response whatsoever to our contentions. Instead, respondent attempts to place the court of appeals' decision upon a basis that is utterly foreign to the opinions below, suggesting (Br. in Opp. 4-9) that it rests upon findings that the indictment charged multiple separate conspiracies as a single offense and that venue for the offenses that he believes should have been charged would not lie in the District of Nevada. This characterization of the decision in this case lacks even colorable accuracy.

The court of appeals recognized (Pet. App. 8a-9a) that, in considering the motion for acquittal made on behalf of defendants Brown, Work and Snyder in 1976, the district court had discussed the questions whether the indictment charged multiple conspiracies as a single offense and whether, if that were so, venue was lacking. But the court of appeals concluded that the 1976 order of acquittal and the dismissal of the indictment as to respondent four years later rested squarely upon the district court's invocation of supervisory power to avoid what was regarded as an "unmanageable" trial. *Id.* at 9a & n.6, 10a, 18a.[1] And

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[1]This assessment of the district court's ruling is clearly correct. See Pet. 5-9. The district court's ruling on respondent's motion to dismiss, invoking the oral ruling from 1976, removes any possibility of confusion on this point (Pet. App. 26a (citations omitted)):

> This Court is well aware that a conspiracy prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators, even though some of them were never physically present there. * * * And, the actions in Las Vegas of Ernst Franz Combs, Jr., an indicted coconspirator, and Gary Lynn Lickert, an unindicted coconspirator, could be used to establish the necessary overt act

even the most casual reading of the court of appeals' opinion reveals that it rests entirely upon supervisory authority exercised on the basis of "institutional concerns" (*id.* at 14a); it does not seek to redress any infringement of respondent's rights or to correct any defect in the indictment or the venue laid. Indeed, the court of appeals never even mentioned any problem involving multiple conspiracies or venue in explaining why, in its view, the supervisory authority it recognized was properly exercised in this case. See Pet. App. 19a-20a. Instead, the court's conclusion was that the dismissed indictment "constituted a serious intrusion into the judiciary's interest in the fair administration of the criminal justice system." *Id.* at 19a.[2]

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within this district. However, the problem in *Brown* [the prosecution of Brown, Work, and Snyder] was that the indictment was such a complex monstrosity that this Court decided it should have been broken down into several smaller, more manageable indictments. There simply was no good reason for those defendants to be indicted in this district given their alleged roles in the Government's conspiracy theory. This Court is confronted with the same problem with the indictment against Gonsalves.

Therefore, for the same reasons articulated in this Court's September 21, 1976, order and judgment of acquittal as to defendants Brown, Work and Snyder, this Court hereby exercises its discretionary supervisory powers and dismisses the indictment as against defendant Gonsalves.

[2]We note, in any event, that none of the cases cited by respondent on the subject of multiple conspiracies (Br. in Opp. 6-7) suggests that the government may be deprived of the opportunity to establish to the satisfaction of a jury that respondent participated in the ongoing unitary conspiracy charged by the indictment. On the contrary, these cases all arise on post-conviction appeal by a defendant, and in each case the court's ability to determine the existence of multiple conspiracies depended upon the availability of the evidentiary record compiled at trial. For instance, the issue framed in *Kotteakos* v. *United States*, 328 U.S. 750, 756 (1946), was whether the "*variance in proof* from the single

There accordingly is no basis for diverting attention from the true ground of the decisions below: the novel assertion of judicial authority to determine, in light of considerations of judicial convenience and the court's views as to optimal prosecutorial practices, whether a prosecution on a charge properly returned by a grand jury should go forward. The court of appeals sought authority for the district court's dismissal of the indictment in Article III, asserting (Pet. App. 16a) that "Article III authorizes the judical branch to review the operations of the executive and legislative branches." But, as this Court noted in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 37 n.21, "[f]ederal courts do not enjoy a roving mandate to correct alleged excesses" of the Executive Branch; they "are limited by Art. III to hearing cases and controversies * * *."[3] The decision below thus runs roughshod over the constitutional independence of the prosecutor and grand jury.

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conspiracy charged in the indictment" was prejudical to the defendant (emphasis added). The other cases cited by respondent are similar.

The question whether a single conspiracy was established was thus —at least in the first instance — for the jury to determine based upon evidence to be adduced at trial. Although respondent repeatedly refers to the "evidence" before the district court (Br. in Opp. 5-6), the fact is that the government was not allowed to put in any evidence. Moreover, respondent's own recitation (*ibid.*) of the outlines of the criminal conduct the government offered to prove makes clear that here, as in many large drug conspiracy cases, the determination whether a unitary criminal enterprise was in operation rests largely upon the details of the evidence and the inferences to be drawn therefrom.

[3]We note that, in his dissent in *Chadha* (slip op. 37), Justice White singled out the process of "initiating prosecutions" as "an inherently executive function," interference with which by another branch of government would raise serious separation of powers issues.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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